DYNAMICS OF SCHEME OF COMPENSATION IN INDIA:
A STUDY OF LEGISLATIVE TRENDS AND JUDICIAL BEHAVIOUR

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INTRODUCTION

"If a man has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; want of right and want of remedy are reciprocal"[1]. This judgement recognized the well known principle of *ubi jus ibi remedium.* Holt C.J. said that "if man will multiply injuries, action must be multiplied too: for every man who is injured ought to have recompense"[2]. Man is a social being and overlapping and encroaching of the other's right by one's action is quit deducible in the human society. For such situations, the law has developed the concept of compensation. It is an age old concept of recompensing an injured person by some pecuniary amount.

COMPENSATION AND ANCIENT LAW

The history of compensation for bodily injury begins shortly after the advent of written history itself[3]. The Nippur Tablet No. 3191 from ancient Sumeria in the fertile crescent outlines the law of Ur-Nammu, king of the city-state of Ur. It dates to approximately 2050 B.C[4]. The law of Ur provided monetary compensation for specific injury to workers' body parts, including fractures. The code of Hammurabi from 1750 B.C. provided a similar set of rewards for specific injuries and their implied permanent impairments. Ancient Greek, Roman, Arab, and Chinese law provided sets of compensation schedules, with precise payments for the loss of a body part. For example, under ancient Arab law, loss of a joint of the thumb was worth one-half the value of a finger. The loss of a penis was compensated by the amount of length lost, and the value an ear was based on its surface area[5]. All the early compensation schemes consisted of "schedules" such as this; specific injuries determined specific rewards. The concept of an "impairment" (the loss of function of a body part) separate from a "disability" (the loss of the ability to perform specific tasks or jobs) had not yet arisen.

Yet the compensation schedules of antiquity were gradually replaced as feudalism of the Middle Ages gradually became the primary structure of

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[1] As per HOLT C.J. in Ashby v white
[2] ibid, at p. 955
[3] Louis DS. Evolving concerns relating to occupational disorders of the upper extremity. Clin Orthop Rel Res. 1990; 254: 140-143
[4] Kramer S.N. History Begins at summer London: Thames and Hudson; 1958. p. 93.
[5] Geerts A, Kornblith B, Urmson J. compensation for Bodily Harm. Brussels: Fernand Nathan; 1977. pp. 7-211

government. The often arbitrary benevolence of the feudal lord determined what, if any, injuries garnered recompense. The concept of compensation for the worker was bound up in the doctrine of noblesse oblige; an honorable lord would care for his injured serf.

LAWS OF MANU

Manu, who is supposed to be the ancient law giver of Hindus, have also mentioned several provisions for compensation in Manu Smriti. For example, at some place he says:

> "the fool who uses a pledge without the permission of the owner, shall remit half of his interest, as a compensation for (such) use"[6].

At some other place he says:

> "In case a man from a lower caste enjoys sex with a woman from a higher caste, the person in question is to be awarded the death sentence. And if a person satisfies his carnal desire with women of his own caste, he should be asked to pay compensation to the woman' faith"[7].

THE HOLY QURAN

The holy Quran contains various provisions relating to compensation. For example:

"O ye who believe! the law of equality is prescribed to you in cases of murder: the free for the free, the slave for the slave, the woman for the woman. But if any remission is made by the brother of the slain, then grant any reasonable demand, and compensate him with handsome gratitude, this is a concession and a Mercy from your Lord. After this whoever exceeds the limits shall be in grave penalty."[8]

THE HOLY BIBLE [9]

Suppose someone digs or uncovers a pit and fails to cover it, and then an ox or a donkey falls into it. The owner of the pit must pay full compensation to the owner of the animal, but the he gets to keep the dead animal.

At some other place :

If someone's ox injures a neighbour's ox and the injured ox dies, then the two owners must sell the live ox and divide the price equally between them. They

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6 SACRED BOOKS OF THE EAST, EDITED BY F. MAX MULLER, VOL. 25 MANU, at p. 280, 150th verse

7 ibid at p. 318, 366th verse

8 The Noble Quran, 2:178

9 http://books.google.co.in/books?id=I9wP8t9sgI8C&pg=PA61&lpg=PA61&dq=compensation+under+holy+bible&source=bl&ots=GXmWirbAVg&sig=mjumqQYxxOSwGc8dsGwVW3Q9cu4&hl=en&sa=X&ei=X3t3UY75G8aOrQff1oGoCw&sqi=2&ved=0CDEQ6AEwAA#v=onepage&q=compensation%20under%20holy%20bible&f=false

must also divide the dead animal. But if the ox had a reputation for goring, yet its owner failed to keep it under control, he must pay full compensation- a live ox for the dead one – but he may keep the dead ox.

MEANING OF COMPENSATION

The word compensation means, "Something, typically money, awarded to someone as a recompense for loss, injury, or suffering"
According to Black's law dictionary, "compensation means

1. remuneration and other benefits received in return for services rendered ;esp., salary or wages.
2. payment of damages, or any other act that a court orders to be done by a person who has caused injury to another. In theory compensation makes the injured person whole"[10].

Compensation is making things equivalent; satisfying or making amends, a reward for the apprehension of criminals; also that equivalent in money which is paid to the owners and occupiers of land taken or injuriously affected for public purposes and under Act of parliament. Money paid to amend loss or injury. A party who suffers because of a breach of contract is entitled to receive compensation for any loss or damage caused to him thereby.[11]

When any person is injured, or when any person' right is infringed, or when any person is made or put under such condition that he is under unilateral detriment, compensation is the method by which his injury, right or detriment is recompensed to some extent.

In Houghton Main Colliery Co. Ltd[12], it was observed that the word 'compensation' signifies that which is given to recompense an equivalent rendered-damages, on the other hand, constitute the sum of money claimed, or adjudged to be paid as compensation for loss or injury sustained, the value estimated in money of something lost or withheld. The term 'compensation' etymologically suggests the image of balancing one thing against another.

In State of Gujarat v Shantilal,[13] Justice SHAH speaking on behalf of himself and the chief justice said:

> "in ordinary parlance the expression "compensation" means any thing given to make things equivalent; a thing given to or to make amends for loss, recompense, remuneration or pay: it need not therefore necessarily be in terms of money. The phraseology of the constitutional provision also indicates that compensation need not necessarily be in terms of money, because it expressly provides that the law may specify the principles on

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[10] BLACK'S LAW DICTIONARY, EIGHTH EDITION, at p.301
[11] DR. A. R. BISWAS ENCYCLOPAEDIC, LAW DICTIONARY, 3rd edition 2008, at p. 298
[12] In re (1956) 3 All ER 300
[13] AIR1969 SC 634 at p. 644, para 25

which, and the manner in which, compensation is to be determined and given"[14].

In Commissioner of Income Tax v Sham Lal[15], the court said: "although compensation connotes equivalency, it may under a certain statute indicate what the legislature treats as equivalent".

Even in the case of Chief Officer, Bhavnagar Nagarpalika v. Meghjibhai Ugadbhai and Ors.[16] a Division Bench of Gujarat High Court has stated that:

> ".....The word compensation is not defined in the minimum wages act. Its meaning will have therefore to be gathered by means of its usage in the common parlance. Its dictionary meaning, inter alia, connotes the act of compensating and something, especially money, given as a recompense. In the same dictionary the word 'compensate', is defined, inter alia, to mean 'recompense' 'make amends' and 'counter balance'. The dictionary meaning of the term 'recompense', inter alia, is 'make amends to a person for a loss or requite, reward or punish a person in an action. The word 'requite' is referred to in the dictionary, inter alia, to connote 'reward' or avenge (a favor or injury)'. It thus become clear from the above referred meaning of various terms connected with the word 'compensation' that compensation is offered to a person to make amends for some injury or loss caused to him. The person responsible for causing such injury or loss is made liable to pay compensation".

CONCEPT OF COMPENSATION IN INDIA

There has been a constant development in law in the field of compensation in India. In early times this field of law was recognized in civil law or law of torts only. But now it has widened its sphere in criminal law, constitutional law and even in international law.

COMPENSATION UNDER LAW OF TORTS

The concept of compensation is not new in the field of law of torts. With the prevalence of the remedy of 'appeal', in common law, there started the concept

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[14] ibid, the case came to the hon'ble supreme court as an appeal under article 31 and article 14, in which interpretation of the word "compensation" became unescapable.
[15] AIR 1963 Punjab 411
[16] (1995) III LLJ 527 Guj

of damages and compensation. Now a days, compensation can be granted in various torts, for example negligence, trespass, nuisance, defamation, malicious prosecution, deceit etc. In fact it is not wrong to assume that, tort and compensation are the two side of the same coin.

The Indian courts have also evolved the new principle of absolute liability in law of torts. This phrase has come into vogue in the modern law of torts to mean liability without fault, i.e., without intention or negligence. Liability of this kind is exceptional under the common law as the ordinary rule is that a person is liable only for the harm due to his intention or negligence, and not for other kinds of harm which would be merely an inevitable accident. In M. C. Mehta v Union of India,[17] the Supreme Court held:

"where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to any one on account of an accident or in the operation of such hazardous or inherently dangerous activity resulting for example, escape of toxic gas, the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident, and such liability is not subject to any of the exceptions which operate vis-à-vis the tortuous principle of strict liability under the rule of Rylands v Flecher[18]."

COMPENSATION IN CRIMINAL LAW

There are not many provisions for compensation in the criminal law. In fact there is not any express provision for compensation in the Indian Penal Code, which is not a satisfactory state of law. But in criminal procedure code, 1973 there are few provisions, which deal with this subject.

Section 357 provides provision for compensation, which is recoverable from the part of fine and to be applied in defraying expenses of prosecution, to the complainant or victim, to the dependent of deceased, and in case of offences against property, in compensating any bona fide purchaser of such property. Section 357 reads as:

> 357. **Order to pay compensation –**
>
> (1) When a court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the court may, when passing judgment, order
>
> the whole or any part of the fine recovered to be applied –
>
> (a) in defraying the expenses properly incurred in prosecution;
>
> (b) in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the court, recoverable by such person in a civil court;
>
> (c) when any person is convicted of any offence for having caused the death of another person or of having abetted the commission of such an offence, in paying compensation to the persons who are, under the Fatal Accident Act,1855 (13 of 1855) entitled to recover damages from the person sentenced for the loss resulting to them from such death;

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[17] AIR 1987 SC 965

[18] (1866) LR 1 Ex 265,(1868)3 LR HL 330.

(d) when any person is convicted of any offence which includes theft, criminal misappropriation, criminal breach of trust, or cheating, or of having dishonestly received or retained, or of having voluntary assisted in disposing of, stolen property knowing or having reason to believe the same to be stolen, in compensating any bona fide purchaser of such property for the loss of the same if such property is restored to the possession of the person entitled thereto.

(2) if the fine is imposed in a case which is subject to appeal, no such payment shall be made before the period allowed for presenting the appeal has elapsed, or, if an appeal be presented, before the decision of the appeal.
(3) when a court imposes a sentence, of which fine does not form a part, the court may, when passing the judgment, order the accused person to pay, by way of compensation, such amount as may be specified in order to the person who suffered any loss or injury by reason of the act for which the accused person has been so sentenced.
(4) an order under this section may also be made by an Appellate Court or by the High Court or the Court of Session when exercising its power of revision.
(5) at the time of awarding compensation in any subsequent civil suit relating to the same matter, the court shall take into account any sum paid or recovered as compensation under this section.

This section corresponds to section 545 and 546 of the old code. The object of the section 357(3) Cr.P.C., is to provide compensation payable to the person who are entitled to recover damage from the person sentenced even though fine does not form part of the sentence. In awarding compensation it is necessary for the court to decide whether the case is a fit one in which compensation has to be awarded. If it is found that compensation should be paid then the capacity of the accused to pay a compensation has to be determined[19].
In Harikishan v Sukhbir Singh[20] the Hon'ble Supreme Court has recommended to all courts to exercise the power of awarding compensation to victims of offence, conferred by S. 357 of the Cr.P.C1973, liberally, so as to meet the ends of justice in a better way. The hon'ble court said:

"It is an important provision but Courts have seldom invoked it. Perhaps due to ignorance of the object of it. It empowers the court to award compensation to victims while passing judgment of conviction. In addition to conviction the court may order the accused to pay some amount by way of compensation to victim who has suffered by the action of accused. It may be noted that this power of courts to award compensation is not

[19] Arjunan v State, 1997 CrLJ 2327(Mad)
[20] AIR 1988 SC 2127

ancillary to other sentences but is in addition thereto. This power was intended to do something to reassure the victim that he or she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well of reconciling the victim with the offender. It is to some extent a constructive approach to crimes. It is indeed as top forward in our criminal justice system. It therefore, recommends to all courts to exercise this power liberally so as to meet the ends of justice in a better way".

It was also held in this case that:

"The payment by way of compensation must, however, be reasonable What is reasonable, may depend upon the facts and circumstances of each case. The quantum of compensation may be determined by taking into account the nature of crime, the justness of claim by the victim and the ability of accused to pay."

Apart from section 357 there are also a couple of sections dealing specifically with compensation. Section 358 deals with the provisions, for providing compensation to persons groundlessly arrested. But in such cases the magistrate cannot award compensation more than one thousand rupees.

Section 357- A, which has been inserted vide amendment act of 2008[21] provides a very significant provision in this respect which is as follow:

357A. Victim compensation scheme. - (1) Every State Government in co-ordination with the Central Government shall prepare a scheme for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who require rehabilitation.

(2) Whenever a recommendation is made by the Court for compensation, the District Legal Service Authority or the State Legal Service Authority, as the case may be, shall decide the quantum of compensation to be awarded under the scheme referred to in sub-section (1).

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[21] The Code of Criminal Procedure (Amendment) Act, 2008; received the assent of President on 07.01.2009 and Published in the Gazette of India, Extraordinary, Part 2, section 1, dated 09.01.2009

(3) If the trial Court, at the conclusion of the trial, is satisfied, that the compensation awarded under section 357 is not adequate for such rehabilitation, or where the cases end in acquittal or discharge and the victim has to be rehabilitated, it may make recommendation for compensation.

(4) Where the offender is not traced or identified, but the victim is identified, and where no trial takes place, the victim or his dependents may make an application to the State or the District Legal Services Authority for award of compensation.

(5) On receipt of such recommendations or on the application under sub-section (4), the State or the District Legal Services Authority shall, after due enquiry award adequate compensation by completing the enquiry within two months.

(6) The State or the District Legal Services Authority, as the case may be, to alleviate the suffering of the victim, may order for immediate first-aid facility or medical benefits to be made available free of cost on the certificate of the police officer not below the rank of the officer in charge of the police station or a Magistrate of the area concerned, or any other interim relief as the appropriate authority deems fit."

COMPENSATION UNDER CONSTITUTION LAW

The development of constitutional tort which began in the early eighties and was cemented into judicial precedent in Nilabati Behera[22] has profoundly influenced the direction tort law has taken in the past decade. It is in the recognizing state liability, and in denuding the defence of sovereign immunity, thet constitutional tort has taken wide arcs around previously established practices in tort law[23].

At present there is no specific provision for compensation in the constitution of India. In Rudal Shah vs. State of Bihar[24], it was held that, in the exercise of its jurisdiction under Article 32, the Supreme Court can pass an order for the payment of money in the nature of compensation consequential upon the deprivation of a fundamental right to life and liberty of a petitioner.

In Rudal Shah vs. State of Bihar[25], which is the first case in the constitutional history, in which compensation was given under article 32, hon'ble CJ CHANDRACHUD said :

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[22] Nilabati Behera v. State of Orissa, AIR 1993 SC 1960: (1993) 2 SCC 746
[23] S.C. MITRA Law relating to Damages Claims and Compensation, 2nd EDITION
[24] (1983) 4 SCC 141
[25] (1983) 4 SCC 141

".....In these circumstances, the refusal of this Court to pass an order of compensation in favour of the petitioner will be doing mere lip-service to his fundamental right to liberty which the State Government has so grossly violated. Article 21 which guarantees the right to life and liberty will be denuded of its significant content if the power of this Court were limited to passing orders to release from illegal detention. One of the telling ways in which the violation of that right can reasonably be prevented and due compliance with the mandate of Article 21 secured, is to mulct its violaters in the payment of monetary compensation. Administrative sclerosis leading to flagrant infringements of fundamental rights cannot be corrected by any other method open to the judiciary to adopt. The right to compensation is some palliative for the unlawful acts of instrumentalities which act in the name of public interest and which present for their protection the powers of the State as a shield. If civilization is not to perish in this country as it has perished in some others too well-known to suffer mention, it is necessary to educate ourselves into accepting that, respect for the rights of individuals is the true bastion of democracy. Therefore, the State must repair the damage done by its officers to the petitioner's rights. It may have recourse against those officers. Taking into consideration the great harm done to the petitioner by the Government of Bihar, we are of the opinion that, as an interim measure, the State must pay to the petitioner a further sum of Rs. 30,000 (Rupees thirty- thousand) in addition to the sum of Rs. 5,000 (Rupees five thousand) already paid by it. The amount shall be paid within two weeks from today".

In Chairman, Railway Board vs. Chandrima Das[26], the supreme court held, "..... compensation can be granted under public law (constitution) for violation of fundamental rights on the ground of Domestic Jurisdiction based on constitutional provisions and human rights jurisprudence".

In J. K. Traders of Ramakrishna 70MM Theatre v. State of A.P.[27] which is a leading case on culpable inaction of government, the single judge considered the catena of decisions dealing with state liability for compensation and set out the principles deduced, which included:

"constitutional mandate enjoins upon the state to protect the person and property of every citizen and if it fails to discharge its duty, the state is liable to pay the damages to the victims.

The failures or inactions on the part of the state which led to the violation of the fundamental rights more especially under Articles 14, 19 and 21 ..... should have direct nexus to the damage caused/ suffered."

The court also held that, the defence of sovereign immunity stands severely restricted in its discharge of sovereign functions, while undertaking commercial activity.

The High Courts and the Supreme Court may award monetary compensation for injury – mental, physical, fiscal – suffered where it is conclusively established that

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[26] AIR 2000 SC 988

[27] (2000) 5 Andhra LT 726

the state failed to take any positive action in protecting the fundamental rights of citizens.[28]

QUANTIFICATION OF COMPENSATION

The quantum of compensation has acquired a centrality in accident law. The connected aspect of the growing importance of the second schedule to the Motor Vehicle Act 1988 in determining the amount, and boundaries, of compensation is well represented.

While compensation as a public law remedy has developed as a direct response to custodial violence, the determination of the quantum is still uncertain ground. In Amitadyuti Kumar v. state of west Bengal,[29] the Supreme Court enhanced the Calcutta High Court's award of Rs. 20,000 to an "appropriate" sum of Rs. 70,000. In Smt. Suguna v. State of Karnataka,[30] the Karnataka High Court was confronted with the death of an auto driver, whose dependents were his wife, mother and a minor daughter. In "public law", the court held the state "obliged to pay compensation to the petitioner which is quantified at Rs.3 lakhs."[31] In Mst. Madina,[32] the Rajasthan High Court held the petitioner "entitled to at least Rs. 3 lakhs by way of interim relief." These cases do not indicate the basis for determining the quantum. Where a court has ventured to explain it has, at best, been a sketchy exercise. So, in Govt. of NCT of Delhi v. Nasiruddin,[33] the court held:

"Taking into account the decisions of apex court in the matter of Motor Vehicle statute, and the cases noted above, and also the fact that loss of dependencies, if any, is that of parents and their age..... "

But Iqubal Begum,[34] also decided in the Delhi High court adopts a contrary approach:

"The reason for my drawing attention to the judgements and various pronouncement of the Supreme Court is to show that it is not necessary that the criteria laid down in fatal accident cases and allied matters for awarding compensation should be followed by courts in awarding *ex gratia* compensation in custodial death cases. Such an interpretation would lead to treating citizens differently based on their economic strength when rights are violated by the state."

In an earlier survey, the problem of applying principles of Motor Vehicle compensation to cases of custodial death was noticed.[35] That was a case of a convict undergoing life imprisonment where, since the income replacement

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[28] Chairman, Railway Board v. Chandrima Das, AIR 2000 SC 988
[29] (2000) 9 SCC 404
[30] (2000) Cri. L. J. 4408
[31] ibid at 4414. the court directed thet Rs. 2,50,000 be deposited in the daughter's name, and the money used "only for the purpose of her education and marriage."
[32] Mst. Madina v. State of Rajasthan, (2001) 1 Raj LW 266 at 270
[33] (2001) 89 DLT 91
[34] Mst. Madina v. State of Rajasthan, (2001) 1 Raj LW 266 at 270
[35] Usha Ramanathan, "law of torts" 1995 ASIL 447 at 451

principle could not be applied, the court worked on a factor of dependency, unrelated to the convict's contribution to his dependants at the time of his death.[36]

COMPENSATION UNDER INTERNATIONAL LAW[37]

Claims for relief under international law always begin with the law of state responsibility, which is considered to consist of the "secondary rules" that determine the legal consequences of failure to fulfill substantive legal obligations, which are considered the "primary rules." (Examples of "primary" rules include the obligation not to cause persons to become refugees and the obligation not to use force to invade the territory of another state.) According to the International Law Commission (ILC)'s 1996 Draft Rules on State Responsibility, every act by a state which is wrongful under some "primary" rule of international law imposes international responsibility on that state. Wrongful acts occur when an injury is a) caused by conduct consisting of an action or omission which is attributable to the State under international law; and b) that conduct constitutes a breach of an international obligation of the State. It does not matter whether the "primary" international obligation is found in customary law or treaty; nor does it matter whether the same act is considered lawful by the state's own internal law. However, a breach only occurs "if the act was performed at the time when the obligation was in force for that State."[38]

A state that has committed such an internationally wrongful act is obligated to a) discontinue the act and restore the situation to the status quo ante; b) apply remedies provided under its internal law (if they exist) and to pay appropriate compensation if restoration of the pre-existing status is impossible; and c) provide guarantees that the act will not recur.[39] A state to which a claim is made

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[36] suramalla ranulu v. state of AP, (1995) 2 Andh LJ 399.

[37] http://prrn.mcgill.ca/research/papers/artz4.htm last visited on 01. 05. 2013

[38] Articles 1, 3, 4, 17, 18(1). *Report of the International Law Commission on the Work of its Forty-Eighth Session*, 6 May - 26 July 1996 (A/51/10). (The ILC is a UN body composed of geographically diverse legal experts.) The state seeking redress has the burden of proving these factors, while the respondent state has the burden of establishing any defenses; these burdens may shift to the party that has control over the evidence. Thus, in the case of Palestinian refugees, the relevant questions would be a) whether, in 1948 and 1949, the flight of Palestinians from their homes was attributable to the acts or omissions of the State of Israel; and b) if so, whether the obligation not to cause persons to become refugees was in force for Israel at that time.

[39] See Willem Riphagen, *Fifth Report of the International Law Commission on State Responsibility*, UN Doc. A/CN.4/380 and Corr. 1 (1984). "A State that has violated a legal obligation to another state is required to terminate the violation and, ordinarily, to make reparations, including in appropriate circumstances restitution or compensation for loss or injury." *Restatement (Third) of the Foreign Relations Law of the United States*, sec. 901 (The American Law Institute, 1987)[hereinafter *Restatement*]. "For instance, if a foreign embassy has been occupied by a mob, there is an obligation to remove the mob and to return the embassy to its diplomatic staff; there may also be an obligation to pay compensation for the damage to the building and its contents, and for the injuries and indignities suffered by the embassy staff." *Restatement* sec. 901, Official Comment d. (The ALI is a non- governmental organization

must negotiate in good faith to resolve it. "[F]ailure of a state to respond in good faith to a request for negotiation may itself constitute a breach of an international obligation."[40]

Traditionally, international law has applied only to the relation between states. Thus, when a state causes an injury to a private person who is an alien (whether a natural person or a corporation), it is deemed to be an injury to the foreign state of which the alien is a national (or where the company is incorporated). The injury can be to the national's human rights, personal safety, property or other interests. When a state, for example, expropriates the property of foreign investors, the state of which the investors are nationals has the option to diplomatically espouse the alien's claim. A state's "espousal" can take the form of negotiation, mediation, conciliation (including by conciliation commission), arbitration, adjudication, all of which require the respondent state's consent, or, under limited circumstances, nonforceful and proportional unilateral counter-measures. The claimant state maintains control over the espoused claim and can, in fact, waive it; payment of reparations is made to the state, which would normally then turn it over to the injured national.[41]

A relevant question is whether international law requires that a state be found to be at fault in order to make redress for injuries. In other words, is all "wrongful" international conduct blame-worthy? According to leading jurist Ian Brownlie, international tribunals usually follow the theory of objective responsibility: provided that agency and causal connection ("attribution") can be established, a breach of international law occurs through the result alone. Even where a state's agents have acted beyond their authority (ultra vires), or, for that matter, in the absence of intention to harm (dolus malus) or the presence of good faith, it will bear responsibility for all its acts which fail to conform to international legal standards.[42]

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of U.S. legal experts. While the *Restatement* is not an official codification, most of its provisions are intended to reflect U.S. law.)

[40] *Restatement* sec. 902, Official Comment f.

[41] See Donna E. Arzt and Igor I. Lukashuk, "Participants in International Legal Relations," in Charlotte Ku and Paul F. Diehl, *International Law: Classic and Contemporary Readings* (Lynne Rienner Pub., 1998).

[42] Articles 32 and 33. While it is possible to argue over each of these conditions of distress or necessity, in this author's opinion, regardless of who caused the refugees to flee in 1948, it was not an "essential interest" of the state of Israel after the 1949 Armistices to either loot and destroy or expropriate Palestinian property, nor to "institutionalize the blockage" of its return to its owners. See Donna E. Arzt, *Refugees into Citizens: Palestinians and the End of the Arab-Israeli Conflict* (Council on Foreign Relations Press, 1997), p. 16. Moreover, permanent confiscation of property is not normally needed to save lives. Note that the *Restatement*proposes other possible defenses to state responsibility: duress, impossibility, waiver, acquiescence, and perhaps estoppel. Section 901, Official Comment a. For the official United States response to the ILC's 1996 Draft Rules on State Responsibility, see Marian Nash (Leich), "Contemporary Practice of the U.S. Relating to International Law" 92 *Amer. J. Intl. Law*243, 251-267 (1998).

It has long been a general and undisputed principle of international law, going back to Blackstone as well as Grotius, that where there is a legal right, there is also a legal remedy or action at law whenever that right is invaded. This is the flipside of the principle that states have the obligation to make restitution for their wrongful acts and violations of international law. Resolving issues over the nature or extent of the reparation to be made for the breach of an international obligation is, in fact, one of the functions of the International Court of Justice (ICJ). "Ordinarily, emphasis is on forms of redress that will undo the effect of the violation."[43]

In the landmark 1928 Chorzow Factory Case involving Polish expropriation of German-owned industrial property inside Poland, the Permanent Court of International Justice (predecessor to the ICJ) stated: "[R]eparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed." The Court then ruled that this can be accomplished through restitution in kind, or if that is not possible, through just compensation, meaning "payment of a sum corresponding to the value which a restitution in kind would bear," and "the award, if need be, of damages for loss sustained which would not be recovered by restitution in kind or payment in place of it," such as lost profits.[44]

Until about 1974, this general standard, codified in 1938 as the "Hull Formula," which called for "prompt, adequate and effective compensation," predominated. In the 1970's, the "Calvo doctrine," under which non-industrialized states sought to immunize themselves against alien property claims, recognizing only "appropriate" compensation, was supported by the UN General Assembly in its Charter of Economic Rights and Duties of States. Since the end of the Cold War, the Hull formula is more or less back in favor.[45] However, the ILC's 1996 Draft Rules on State Responsibility provide three conditions in which either full monetary reparations or restitution in kind might be limited: 1) where reparation would "result in depriving the population of a State of its own means of subsistence"; 2) where in-kind restitution would involve "a burden out of all proportion to the benefit which the injuring State would gain from obtaining restitution in kind instead of compensation"; and 3) where in-kind restitution

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[43] *Restatement* sec. 901, Official Comment d. International tribunals are given wide latitude to develop and shape remedies. Id. See generally Hugo Grotius, *De Jure Belli Ac Pacis Libri Tres*12 (1625, English trans. by Francis Kelsey, 1949); *Marbury v. Madison*, 5 U.S. (Cranch) 137, 163 (1803), quoting William Blackstone's *Law Commentaries*; and Theo Van Boven, *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms: Preliminary Report*, UN Doc. E/CN.4/Sub.2/1990/10. See Article 36(2)(d) of the Statute of the International Court of Justice.

[44] *Chorzow Factory Case* (Germany v. Poland), 1928 PCIJ (Ser. A) No. 17 (Judgment of Sept. 13, 1928).

[45] See Burns H. Weston, "The Charter of Economic Rights and Duties of States and the Deprivation of Foreign-Owned Wealth," in Ku and Diehl, supra; and Patrick M. Norton, "A Law of the Future or a Law of the Past? Modern Tribunals and the International law of Expropriation," 85 *Amer. J. Intl Law* 474 (1991).

would "seriously jeopardize the political independence or economic stability of the State which has committed the wrongful act, whereas the injured State would not be similarly affected if it did not obtain restitution in kind." The ILC recognized in its own official Commentary to these provisions that they were controversial, involved admittedly extreme cases, and had been rejected by some ILC members. Nevertheless, these exceptional provisions have "nothing to do with the obligation of cessation, including the return to the injured State, for example, of territory wrongfully seized."[46]

International law looks both to international and regional institutions such as arbitration tribunals and, where a consistent pattern emerges, the decisions of national courts and legislatures, as sources of customary international norms and standards. While much has been written on the extensive case law of the Iran-U.S. Claims Tribunal and the more recently established UN Claims Commission (dealing with the Iraqi invasion of Kuwait),[47] other forums provide some more directly applicable models for compensation.

The European and Inter-American Courts of Human Rights regularly award compensation to aggrieved individual victims of human rights violations. In the recent June, 1999 decision in Zubani v. Italy, the European Court ordered compensation to four elderly Italian nationals for unlawful municipal occupation of their farm land. The Court factored into the amount owed the fact that the municipality had laid a road through a part of the applicants' property used to raise livestock, which rendered accessdifficult to the plots ordered returned to them.[48] Construing and applying the article on protection of property in the Council of Europe's first Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, in a case involving stockholder interests nationalized under the 1977 British Aircraft and Shipbuilding Industries Act, the European Court has also held that the taking of property in the public interest without any compensation is justifiable only in exceptional circumstances. A fair balance must be struck between the demands of the general interest of the

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[46] Articles 42 and 43 and Commentary 8(a) and (b), *Report of the International Law Commission on the Work of its Forty-Eighth Session*, supra. It would be useful to determine whether Israel has submitted official responses to these particular Draft Articles.

[47] See e.g. Richard B. Lillich and Daniel Barstow Magraw, eds., *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* (American Society of International Law, 1998); David D. Caron and John R. Crook, eds., *The Iran-United States Claims Tribunal: Its Contribution to the Resolution of International Claims* (American Society of International Law, 1996); George Aldrich, "What Constitutes a Compensable Taking of Property? The Decisions of the Iran-United States Claims Tribunal," 88 *Amer. J. Intl Law* 585 (1994); Richard B. Lillich, *The United Nations Compensation Commission* (Transnational Publishers, 1995); David J. Bederman, "The United Nations Compensation Commission and the Tradition of International Claims Settlement," 27 *N.Y.U.J. of Intl Law & Politics* 1 (1994); and Veijo Heiskanen and Robert O'Brien, "UN Compensation Commission Panel Sets Precedents on Government Claims," 92 *Amer. J. Intl Law* 339 (1998).

[48] *Judgment (Just Satisfaction), Case of Zubani v. Italy* (Art. 41), Applic. No. 14025/88, 16 June 1999.

community and the protection of the individual's fundamental rights. A disproportionate burden should not be imposed on individual owners.[49]

Beginning with its first contentious case, Velasquez Rodriguez v. Honduras, the Inter-American Court has ordered the payment of fair compensation to the next of kin of "disappeared persons" and other victims of gross human rights abuses, often calculated according to the loss of earnings the victim would have received up to the time of his possible natural death, along with moral damages for the harmful psychological impact on the victim's immediate family.[50] To date, only Europe and the Americas have Courts of Human Rights with jurisdiction over individual claims -- and then, only with the consent of state parties to the respective conventions and protocols -- though an African Court to supplement the African Commission on Human and People's Rights has been proposed for consenting OAS member states.

War Reparation Cases

At least as early as the end of the Eighteenth Century, customary international law has provided rights of compensation to private persons during war against the enemy state. Even before World War II, claims commissions awarded compensation to survivors of civilians killed during war and for destroyed property.[51] The International Criminal Tribunal for the Former Yugoslavia provides that, after judgments of conviction, the Trial Chamber may hold a special hearing to determine the restitution of property, and the Tribunal's judgments as to criminal responsibility of convicted persons shall be considered final and binding in regard to claims for compensation brought by victims in national courts or other bodies.[52] Other potential models include German reparations to individual Holocaust survivors and to the State of Israel,[53] as well as recent developments concerning Jewish assets and cultural property taken by Swiss banks and other ostensibly "neutral" Nazi allies.

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[49] *Lithgow and others v. United Kingdom* (Series A, No. 102), (1986) 8 EHRR 329. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted in Paris, 20 March 1952, as amended by Protocol No. 11 (ETS No. 155). Article 1 reads: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shal l be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The proceeding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

[50] See e.g. *Velasquez Rodriguez Case, Compensatory Damages* (Art. 63(1)), Judgment of July 21, 1989, Inter-Am. Ct.H.R. (Ser. C) No. 7 (1990).

[51] See e.g. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 279 (1796); *Garcia v. United States* (Decision of the General Claims Commission, United States and Mexico), No. 292, 3 Dec. 1926, reprinted in 21 *Amer. J. Intl Law* 581 (1927); Treaty of Versailles, June 28, 1919, 1 Bevans 43; and Benjamin Ferencz, "Compensating Victims of the Crimes of War," 12 *Va. J. Intl Law* 343 (1972).

[52] Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia, as amended, IT/32/, Rules 105 and 106.

[53] See Nicholas Balabkins, *West German Reparations to Israel* (Rutgers University Press, 1971); Nana Sagi, *German Reparations* (St. Martins Press, 1980); Agreement Between the Federal Republic of Germany and Israel, 162 U.N.T.S. 205, 10 Sept. 1952.

Post-Communist Transitions

Another avenue of comparison is the national legislation of former Soviet bloc states which, since the fall of the Berlin Wall, have offered restitution to both nationals and non-nationals for property taken over 40 years ago by Communist governments as well as in some cases, by the Nazi regime. For instance, Hungary has awarded government vouchers constituting full restitution, even for nominal losses of property. Since the reunification of Germany, the government has offered claimants either the return of their land or its current market value in currency. Where property cannot be returned, for instance when it has been used for new enterprises or sold to bona fide purchasers, the German government offers a choice of land of comparable value, money, or shares of the new enterprise.[54]

Environmental and Aboriginal Claims

National and international environmental law offers a rich source of models of damage assessment, in which the injured party is usually the national or international community as a whole rather than private individuals. In effect, the claimant is not former but future generations, whose equitable interests in a clean and healthy environment need to be protected now; payment of compensation in the present is one way to discourage additional spoilation.[55]

Claims of indigenous peoples to title in native land is, perhaps, an even more direct analogy for Palestinians. Canada and Australia have been in the forefront of the effort to make redress for land confiscation in the distant past. Following the 1992 Mabo v. Queensland judgment of the High Court of Australia, the federal legislature adopted the 1993 Native Title Act (NTA), which provides compensation to native title holders whenever a validated past act of the Commonwealth extinguished native title. For validated past acts which did not extinguish title, the law provides compensation when the original act was discriminatory, i.e. when it could not have been done over non-aboriginal land, or when it constituted an acquisition of property on unjust terms.[56]

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[54] See, e.g. William R. Youngblood, "Poland's Struggle for a Restitution Policy in the 1990's,"*Emory Intl Law Rev.* (Fall 1995).

[55] See e.g. Peter Wetterstein, ed., *Harm to the Environment: The Right to Compensation and the Assessment of Damages* (Clarendon Press, 1997).

[56] Sections 17 and 18 of the Native Title Act. See Daniel C.H. Mah, "The National Native Title Tribunal: Compensation Issues - A Discussion Paper" (April 1995), available at: http://www.murdoch.edu.au/elaw/issues/v2n1/mah21.html . Mah writes: "[C]an indigenous people claim compensation for the loss of their spiritual connection with their land? Established principles of valuation under compulsory acquisition statutes allow compensation to be paid for the 'special value' of the land to the owner of ordinary land title. However, this special value is usually limited to value arising from some special feature, or the location, of the land rather than sentimental value....[I]t is at least arguable that failure to compensate for the loss of connection with land would be to fail to justly compensate for the extinguishment or suspension of native title." Id., citing D. Brown, *Land Acquisition* (3rd ed., Butterworths, 1991), p. 97; *Onus v. Alcoa of Australia Ltd.* (1982) 149 CLR 27; and Hansard, House of Representives, 16 November 1993, p. 2882.

Therefore we can see that the concept of compensation has deeply penetrated in all spheres of law.

This research aims to discuss the scheme of compensation in the contemporary world, as well as to discuss the law of compensation in various fields of law like civil law, criminal law, constitutional law etc. This research also tries to find out what are those factors which a judge keeps or must keep in his mind while deciding the quantum of compensation.

NEED FOR THE STUDY OF THE SUBJECT

In almost all the segments of the law compensation forms the integral part. Now-a-days compensation is given under civil, criminal, constitutional and international law. The quantum of compensation depends solely upon the subjective considerations of judges. The quantum of compensation varies from case to case. It is therefore pertinent, to know that, what are those oblique and prominent considerations which a judge keeps in his mind while deciding the quantum of compensation.
Secondly, the law relating to compensation is in haphazard condition. It is not in the orderly manner and there is a need for arranging it in some ordinate manner. Also the law relating to compensation is not sufficient enough to deal with new types of situation where infringement of human rights of poor laborers are at writ large in the field of infrastructure sector. The law relating to compensation also does not deal with the problem of inordinate delays in the ordinary legal process where there is grave injustice and urgent need of passing of award of compensation by courts of law.
Exercising writ jurisdiction, courts are awarding damages in several cases, and now the Human Rights commission is also awarding compensation in established cases of violations. However, there is still a need to codify the law of compensation in the instances of human rights violation.[57]

(a) Interim Compensation: If prima facie is made out by the judicial inquiry, then interim compensation can be awarded to victims or his relatives.[58]
(b) Need for comprehensive law on compensation: due to lack of guidelines or a comprehensive legislation for awarding compensation, it is left to the

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[57] Ramaswamy iyer's The Law Of Torts A Lakshminath M Sridhar Tenth Edition at p. 178
[58] ibid at p. 178

varying discretion of the individual jadges. There should be a rationale or conceptual basis for award of compensation.[59]

OBJECTIVES OF RESEARCH

The objectives of research is to thoroughly investigate the constitutional provisions, the civil, criminal and international legislations as well as the judicial trends regulating the law relating to compensation, and to find out whether the present law is sufficient enough to deal with all types of problems. What are the major drawbacks in the present scenario? And finally what can be done to improve the existing law relating to compensation.

RESEARCH QUESTIONS

According to my initial study and without going thoroughly in depth of the subject the following are the research questions:

(1) Is the law of compensation well efficient to deal with all situations of the infringement of legal rights?

(2) What are those considerations which a judge keeps in his mind while deciding the quantum of compensation?

(3) Are the legislative trends and provisions relating to compensation sufficient to deal with the present socio-economic scenario?

(4) Why can't compensation be given in each and every case before the law courts?

(5) Is justice done even after awarding the compensation to the injured and grievance being counter balanced?

(6) What is the significance of law of compensation in the field of civil, criminal law?

(7) Damages and compensation connotes almost the same. What is the basic difference between them?

(8) Does the law of compensation deals with the interim measures for the victims of crimes, and in cases of grave urgency?

HYPOTHESES

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[59] ibid

(A) A wide variety of statutory provisions, administrative regulations and codes of practices relating to compensation are in existence to ensure that where there is a right there is a remedy (ubi jus ibi remedium). However, the existing legal measures are inadequate to deal with all cases of infringement of legal right, especially where the victims are poor people, ignorant about their rights.

(B) Judge's discretion plays a prominent role in deciding the quantum of compensation. What are those oblique considerations which a judge has in mind while deciding the gravity and quantum? Isn't it possible to frame a straight-jacket formula for deciding the quantum of compensation in all cases?

(C) It takes almost decades for the victims to get compensation and lot of money getting consumed in the ordinary legal process after the infringement of their legal rights.

Review of literature

In order to understand the above raised questions, properly, it would be desirable to review the existing literature pertinent to our research problem. In the context of the present study it is important to take cognizance of some of the studies, related to our research problem.

- Law Relating to damages, Claims And Compensation: by S. C. Mitra
- Law Of Damages And Compensation: by J.P. Singhal
- Law Of Torts With Law Of Statutory Compensation And Consumer Protection: by B. M. Gandhi
- Law Of Torts: Law Of Statutory Compensation: by P.S.A. Pillai
- M.P. Jain Indian Constitutional Law
- Right To Property And Compensation Under The Indian Constitution, by M.L. Singhal
- Compensation For Violation Of Fundamental Rights: A New Remedy In Public Law, Distinct From Relief Of Damages In Tort,: by V.K.Sircar
- Compensation Through Writ Petition: An Analysis Of Case Law, Vikram Raghavan
- An Analysis Of The Vanishing Point Of Indian Victim Compensation Law: by Jhalak Kakkar and Shruti Ojha
- Law Commission Of India: 226th Report
- Victims Of Dowry Death And Compensation: by Parvathi S.
- Compensation Orders Against Offenders- An Australian Perspective: Vince Morabito

Methodology and research strategy

The objectives of this study are planned to achieve through the combination of, analytical, case study and comparative study method and by secondary sources. But if required the help of empirical research may also be taken.

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Chapter 1: introduction
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- What is the need of study of this subject?

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